No. 83-6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARROLL D. BESADNY, et al,

Appellants,

v

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, et al,

Appellees.

STATE OF WISCONSIN, a sovereign state, and SAWYER COUNTY, WISCONSIN,

Appellants,

v

UNITED STATES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
(Counsel of Record)

Michael J. Moquin
Assistant Attorney General
Appellate Division
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1983

TABLE OF CONTENTS

INDEX OF AUTHORITIES

No. 83-6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARROLL D. BESADNY, et al,

Appellants,

v

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, et al,

Appellees.

STATE OF WISCONSIN, a sovereign state, and SAWYER COUNTY, WISCONSIN,

Appellants,

v

UNITED STATES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN PURSUANT TO RULE 36.4 IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

These cases involve construction of Indian treaties affecting lands principally in the State of Wisconsin, but also affecting territory within the States of Minnesota and Michigan. One of the issues raised in *Besadny* v *Lac Courte Oreilles Band, sub nom Lac Courte Oreilles Band* v *Voigt*, 700 F2d 341 (CA 7, 1983) (1a) and the chief one which amicus addresses, is

whether the Indian signatories to the 1854 *Treaty with the Chippewa* (161a) relinquished, or retained, hunting and fishing rights which had been reserved under 1837 and 1842 treaties in which lands had been ceded to the United States.

The laws of Michigan contain various restrictions on hunting and fishing which are similar to the Wisconsin statute which the Court of Appeals held conflicts with the 1837 and 1842 treaties with reference to off-reservation hunting and fishing activities by the Lac Courte Oreilles Band. In so holding, the Court of Appeals ruled that the reservation-establishing treaty of 1854 did not abrogate the privilege to hunt and fish guaranteed to the Chippewa Indians within lands ceded by them in the treaties of 1837 and 1842 (51a).

No Michigan-based Chippewa Bands were signatories to the 1837 treaty (150a), and no land within the State of Michigan was affected. Among the Lake Superior Chippewa Bands who were signatories to the 1842 treaty (156a) were three bands residing in the Upper Peninsula of the State of Michigan: Onlonagon (Ontonagon) (part of which band is now known as the Red Cliff Band in Wisconsin), Ance (L'Anse), and Vieux Desert (Lac Vieux Desert) (160a-161a). By the treaty of 1842 (156a-157a), the Chippewa ceded to the United States lands (1) in the northerly portion of Wisconsin adjoining the State of Michigan and Lake Superior (148a) and (2) in the western portion of the Upper Peninsula of Michigan (see Attachment 1 as to the Michigan cession). The greater mass of the land so ceded is in Michigan.

The three Michigan bands of the Lake Superior Chippewa were also signatories to the Treaty of 1854 (161a), by which lands solely within the territory of Minnesota were ceded to the United States. Under article 2, sections 1st and 6th (163a-

164a), the three Lake Superior Chippewa Bands from Michigan (who were among the signatories to the 1842 treaty) were granted reservations within previously-ceded land in the Upper Peninsula of Michigan. The 1854 treaty, by creating reservations from ceded lands, abandoned the removal policy underlying the 1837 and 1842 treaties, and abrogated hunting and fishing rights previously retained by the Indian signatories within lands ceded in the 1837 and 1842 treaties.

The three Michigan-based Lake Superior Chippewa Bands that were signatories to the treaties of 1842 and 1854 have a government-to-government relationship with the United States, and are known as the Keweenaw Bay Indian Community of L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians of the L'Anse Reservation, Michigan.

The Seventh Circuit's decision in this case, in misconstruing the 1854 treaty, may have a significant impact upon the ability of the State of Michigan to regulate off-reservation hunting and fishing by members of the Keweenaw Bay Indian Community, as well as other members of Wisconsin Chippewa bands who signed the 1842 treaty, within lands ceded by the 1842 treaty as modified by the Treaty of 1854. Although the Michigan Chippewa were not parties in the principal action, they were signatories to the 1854 treaty under which, the Seventh Circuit held, the Respondent Wisconsin Indian band did not relinquish the privilege to hunt and fish within any lands ceded under the 1837 and 1842 treaties which have not passed into private ownership (52a).

SUMMARY OF ARGUMENT

THE RESERVATION-ESTABLISHING 1854 TREATY MODIFIED AND SUPERSEDED CERTAIN PROVISIONS OF THE 1837 AND 1842 TREATIES IN WHICH THE INDIANS STIPULATED FOR CERTAIN USE PRIVILEGES ON CEDED LANDS UNTIL THE INDIANS WERE REQUIRED TO REMOVE FROM SUCH CEDED LANDS.

In Indian treaty matters, actions of Congress, whether by treaty or legislation, affecting the same tribe or group of Indians, are to be construed *in pari materia*. *See, eg, United States* v *Mitchell*, 445 US 535, 542 (1980). While the Court of Appeals accepted the District Court's analytic framework that the treaties of 1837, 1842 and 1854 were *in pari materia* (47a-48a), the Court of Appeals, contrary to the District Court, concluded that the parties to the 1854 treaty did not intend to extinguish the use privileges within lands ceded pursuant to the two earlier treaties (*Id.*) Amicus agrees with Appellants that the District Court correctly discerned "the parties' intention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food" (146a) on the lands previously ceded in 1837 and 1842. *United States* v *Bouchard, United States* v *Ben Ruby & Sons, et al* and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al* v *Voigt, et al*, 464 F Supp 1316, 1361 (WD Wis, 1978) (146a). It is the parties' intention, and not solely that of the superior side, that must control any attempt to interpret treaties with the Indians. *Washington* v *Washington State Commercial Passenger Fishing Vessel Assn*, 443 US 658, 675-676 (1979).

> "'[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 676.

This Court has also stated:

> "A canon of construction . . . [that is,] the rule by which legal ambiguities are resolved to the benefit of the Indians . . . is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau* v *District County Court*, 420 US 425, 447 (1975).

Finally, as stated in F. Cohen, *Handbook of Federal Indian Law* (1982 Ed.) at 468:

> "Indian hunting and fishing rights can be terminated in the same way as other treaty rights. They can be extinguished by the terms of the treaty itself, by Act of Congress, or by a subsequent inconsistent treaty. Congressional intent to abrogate or modify an Indian treaty, however, is not lightly imputed."
> (footnotes omitted)

Cf. United States v *Sante Fe Pacific RR Co*, 314 US 339, 357-358 (1941).

It is clear in this case that the District Court, after extensive review of the facts and circumstances surrounding the three treaties, did not "lightly impute" that the 1854 treaty abrogated the use privileges reserved in the prior two treaties. Instead, the District Court found that the evidence "strongly implies the parties' intention" (146a) that the latter treaty extinguished use privileges stipulated for in 1837 and 1842. Contrary to the District Judge's conclusion, the Court of Appeals held that "[n]othing in the record compels the conclusion" that the Lac Courte Oreilles Band understood, and that the government intended, that the 1854 treaty abrogated the use rights recognized in the prior treaties (49a). Amicus agrees with the conclusion reached by the District Court, that the record evidence

strongly indicated the finding that the Indians understood, and the government intended, in the 1854 treaty to extinguish prior use rights on ceded lands.

The 1854 reservation-established treaty formally abandoned, and reversed, the Indian removal policy which was the impetus behind the two earlier treaties, the attempted effectuation of such policy by the 1850 removal order leading to the 1854 treaty negotiations.

1. TREATIES OF 1837 AND 1842

The 1837 Treaty with the Chippewa, 7 Stat 536 (150a), concluded at St. Peters in the Wisconsin territory, ceded, in exchange for the payment of annuities and satisfaction of certain debts, land in the territories of Wisconsin and Minnesota. No Chippewa from the State of Michigan were signatories to the treaty, and no Michigan land was affected. Article 5 of the 1837 treaty provides:

> "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States." (153a).

The circumstances surrounding the making of this treaty are set forth in the opinion of the District Court (56a-60a) and that of the Court of Appeals (3a-7a).

In the 1842 Treaty with the Chippewa, 7 Stat 591 (156a), signed at La Pointe in Wisconsin, lands in the western portion of the Upper Peninsula of the State of Michigan (see Attachment 1) and lands within the territory of Wisconsin (148a) were ceded by Chippewa signatories from the affected lands in

Michigan and Wisconsin, as well as from the territory of Minnesota. Article II of the treaty pertinently provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States . . . ." (157a). Article III states:

> "It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty." (157a-158a).

The unceded lands belonging to the Fond du Lac, Sandy Lake, and Mississippi bands were all located within the territory of Minnesota, to which the Michigan and Wisconsin Chippewa who had ceded lands in the treaty would be required to locate if removal was ordered by the President.

Further salient provisions of the 1842 treaty (Article IV) (158a) included the payment of annuities, benefits, and the satisfaction of certain Indian debts. The treaty did not provide for the place where, and time when, annuity payments would be made to the Indians. Additional circumstances concerning the treaty are set forth in the opinion of the District Court (58a-62a) and in that of the Court of Appeals (5a-6a).

2. EVENTS FOLLOWING THE 1842 TREATY

The courts below noted that white settlement greatly increased within the ceded lands following the signing of the 1842 treaty (7a; 62a). The 1846 Report to the Commissioner of Indian Affairs suggested that the Chippewas be removed to the land set apart for them west of the Mississippi (63a). In the summer of 1847, two government agents unsuccessfully at-

tempted to secure Chippewa agreement to a resettlement plan (7a; 64a). During this time, the Commissioner of Indian Affairs continued to recommend removal of the Indians to the unceded Chippewa lands in Minnesota described in Article III of the 1842 treaty (8a; 63a-66a). In February of 1849, there was introduced in Congress a petition of the Lake Superior Chippewa seeking a "'donation of 24 sections of land, covering the graves of our fathers, our sugar orchards, and our rice lakes and rivers, at seven different places now occupied by us as villages . . . .'" (66a). The petitioners further stated that in addition to seeking the land for the purposes set forth, they also desired the land "for permanent cultivation and permanent homes." (66a). Further, in October of that year, the Legislative Assembly of the Minnesota territory requested the President to remove the Chippewas to another unsettled area. (*Id*).

3. THE 1850 EXECUTIVE ORDER

Following the repeated urgings of the Commissioner of Indian Affairs, and that of the Secretary of the Interior, the President issued, on February 6, 1850, an executive order specifically revoking "[t]he privileges granted temporarily to the Chippewa Indians" by Article 5 of the 1837 treaty, and by the second article of the 1842 treaty. (8a-9a, 67a). In 1850, a further attempt to effect removal occurred when the place for payment of annuities was changed from La Pointe, Wisconsin, to Sandy Lake in the territory of Minnesota, the "removal" area, which resulted in hardship and death to many Indians (10a-11a; 70a-71a). As the result of an agreement between the Indians and the government Indian agent, the place for payment of the 1851 annuities was changed to Fond du Lac, Minnesota. The Indians again found poor provisions, and Chippewa Chief Buffalo requested that all future payments be made at La Pointe (12a; 71a-73a). A delegation of Chippewa Chiefs and braves travelled to Washington to meet with President Fill-

more regarding the removal order. Benjamin Armstrong accompanied the Indians as their interpreter, and in subsequetly reporting what took place, stated that the Chiefs met with President Fillmore. As stated by the Seventh Circuit:

> "According to Armstrong, on June 12, 1852, Chief Buffalo dictated a memorial to President Fillmore. He again expressed his understandings that treaty annuities were to be paid at LaPointe and that the Indians were to be permitted to remain on their lands for 'one hundred years to come.' The Chief beseeched the President and his agents to honor the Treaty of 1842 as the Indians understood it. President Fillmore told the delegation that he would countermand the Removal Order of 1850 and that annuity payments would henceforth be made at LaPointe. He gave Chief Buffalo a written instrument explaining these promises. The delegation returned home. There is apparently no current record of the President's explicit contravention of the removal order." (12a).

Armstrong reported that the 1852 annuity payments were made at La Pointe in mid-October, and that the President's letter was explained to the Indians there convened:

> "Chief Buffalo told them there was yet one more treaty to be made with the President, 'and he hoped in making it they would be more careful and wise than they had heretofore been and reserve a part of their land for themselves and their children.'" [Quoted from B. G. Armstrong, *Early Life Among The Indians*, p 32 (1892).] (14a; 74a).

In 1853 and 1854, the annuity payments were made at La Pointe. (74a). In his December 14, 1853 report, Wisconsin Indian agent Gilbert reported that the " 'great terror' " of the Indians was the Removal Order, and that they would "prob-

ably 'sooner submit to extermination than comply with it'", additionally reporting that the Indians and the whites in the area were living peacefully and harmoniously with one another. *Id.*

The Court of Appeals agreed with the District Court that the removal order of 1850 was invalid (44a) as the Indian signatories to the Treaty of 1842 had been assured that removal would be ordered only if they misbehaved. The courts found the Indians had not. Appellants' *Jurisdictional Statement* addresses at length the 1850 removal order whose issuance, it is contended, extinguished any permissive occupancy and use privileges on the ceded lands. Assuming, for the sake of argument, that the 1850 removal order was unauthorized, amicus believes it is nevertheless extremely relevant to the understanding of the circumstances of the 1854 treaty. The executive order indicates the government's attempted consummation of the then-prevalent and long-standing presidential and congressional policy of Indian removal, as provided for in Article 5 of the 1837 treaty and Article II of the treaty of 1842 (3a).

In other words, the treaties of 1837 and 1842, premised on the policy of removing Wisconsin and Michigan Chippewa onto their unceded lands in the territory of Minnesota, granted to the Chippewa use privileges on ceded lands until their contemplated removal was ordered. In 1850, removal was ordered, but shortly thereafter removal efforts were held in abeyance, and then abandoned, by the reservation-establishing Treaty of 1854 which, in effectively overruling the 1850 executive order, also modified and superseded provisions of the two earlier treaties upon which the removal policy was premised. Thus, the Treaty of 1854 abandoned the removal policy—to which use privileges on ceded lands until removal had been tied. As removal was abandoned,

so were use privileges extinguished on any non-reservation lands (except to the extent that Chippewa custom and geographic location of particular reservations indicate otherwise).

4. THE TREATY OF 1854

The 1854 Treaty with the Chippewa, 10 Stat 1109 (161a) concluded at La Pointe in the State of Wisconsin, ceded to the Unites States, in exchange for the establishment of reservations in Wisconsin, Michigan, and the territory of Minnesota and payment of annuities in satisfaction of certain debts, lands exclusively located in Minnesota (14a; 142a-143a). In exchange for the Minnesota land cession, reservations were established for the signatory tribes (or provisions made for their establishment) within the seven separate paragraphs of Article 2 (163a-164a).

Paragraph 3d of Article 2 provided for the establishment of a reservation for the Lac Courte Oreilles Tribe; paragraph 1st and paragraph 6th of Article 2 similarly established reservations for the three Michigan-based Chippewa Bands who signed the 1854 (as well as the 1842) Treaty. Since no Wisconsin or Michigan lands were ceded to the United States in the 1854 Treaty, it is apparent that the reservation land granted by the United States to the Wisconsin and Michigan-based Chippewa in the 1854 Treaty came from lands previously ceded to the United States by the Indians in the treaties of 1837 and 1842. Since only lands within the territory of Minnesota were ceded in the 1854 Treaty, it would appear that signatures of Minnesota-based Chippewa only would be required, and not signatures of other Chippewa bands residing in Wisconsin and Michigan. Wisconsin and Michigan-based Chippewa were signatories to the 1854 Treaty because these Chippewa resolutely insisted that reservations be established for them as permanent homes (78a), as a first

condition of any further treaty, and for the additional reason that material provisions of the 1837 and 1842 treaties were modified and superseded by the 1854 Treaty.

It must again be emphasized that under Article 5 of the 1837 Treaty, and Article II of the 1842 Treaty, the Wisconsin and Michigan Chippewa signatories reserved use rights, including hunting and fishing, on the ceded territory, until required to remove by the President. Under Article III of the 1842 Treaty (under which treaty Wisconsin and Michigan lands were ceded), it was provided that should removal be ordered by the President, the Wisconsin and Michigan-based Chippewa would be required to locate within unceded lands in the territory of Minnesota. To cancel this provision, the 1854 Treaty, Article 11, pertinently stated that

> "The Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."

With respect to that portion of Article 11 providing that "the Indians shall not be required to remove from the homes hereby set apart for them", the language clearly refers to the reservations established in Article 2 of the Treaty, which established: (1) reservations from lands in Wisconsin and Michigan which were ceded in the 1837 and 1842 treaties; and (2) reservations in Minnesota from land ceded in the 1854 treaty itself. Given the fact that the 1842 treaty did not affect lands within the territory of Minnesota, and that the Treaty of 1854 ceded to the United States lands solely within Minnesota, it is also clear that the language of Article 11 quoted above—"[a]nd such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein,

until otherwise ordered by the President"—solely refers to the Minnesota lands ceded by the 1854 Treaty.

Thus, while the 1854 Treaty resulted in the cession of lands within the territory of Minnesota to the United States, hunting and fishing privileges on lands ceded in that treaty were solely guaranteed to Minnesota-based Chippewa. Most significantly, the prior removal policy underlying the 1837 and 1842 treaties, to which hunting and fishing use rights on ceded lands had specifically been tied for the Wisconsin and Michigan Chippewa signatories—with provision in the 1842 treaty for removal to the territory of Minnesota—was nullified by Articles 2 and 11 of the 1854 treaty which established reservations on previously-ceded lands. Article 11 specifically guaranteed that they "shall not be required to remove from the homes set apart for them".

Therefore, the 1854 Treaty both modified and superseded the removal provisions of the 1837 and 1842 treaties to which hunting and fishing rights were specifically annexed. It is contended, as concluded by the District Court, that the establishment of reservations within previously-ceded lands extinguished the concomitant, conditional use privileges which were retained only until removal was ordered. Since the removal provision was specifically abandoned by Article 11, in conjunction with Article 2, of the 1854 Treaty, the use privileges existing until removal was ordered were extinguished as to non-reservation lands (except to the extent that Chippewa custom and the particular geographic location of reservations indicate otherwise; *eg*, *State* v *Gurnoe*, 53 Wis 2d 390; 192 NW2d 892 (1972); *People* v *Jondreau*, 384 Mich 539; 185 NW2d 375 (1971); Michigan Attorney General Opinion 5714, 1979-1980 Biennial Report, p 800 (May 29, 1980)).

Several other provisions of the 1854 Treaty testify to its modifying and superseding effect on the treaties of 1837

and 1842. Under the two earlier treaties, there was no specification of the place where annuities were to be paid the Chippewa. In seeking to collect their annuities under the 1842 Treaty, the Chippewa sought payment at the customary place, La Pointe in Wisconsin. Despite the fact that no lands outside the territory of Minnesota were ceded under the 1854 Treaty, Article 11 thereof provided that all annuity payments to the Chippewa would thereafter be made at L'Anse (Michigan), La Pointe (Wisconsin), Grand Portage (Minnesota) and on the St. Louis River (Minnesota). The annuity payment provision, located in the same article of the 1854 Treaty which guaranteed against removal of the Chippewa from reservations established under Article 2, also acted as an explicit abrogation of that aspect of the removal policy wherein an annual trek to Sandy Lake for payment of provisions had been required in 1850 and 1851. The District Court quoted in full the February 27, 1854 Memorial of the Wisconsin Legislature, which was sent to the President and Congress, relating to the Chippewa Indians of Lake Superior (75a-76a). The Memorial requested that the President rescind the 1850 removal order, that annuity payments (under the 1842 Treaty) be made at La Pointe and encouraged the federal government to provide for the "permanent settlement" (76a) of the Wisconsin Chippewa within the State.

Prior to this Memorial, the Michigan Legislature had twice passed joint resolutions relative to the Chippewa Indians, requesting that they be allowed to permanently settle in the State of Michigan. On April 7, 1851 (1851 Public Laws, Joint Resolution No. 15, at pp 258-259) (Attachment 2) the Michigan Legislature:

> ". . . hereby request the government of the United States to make such arrangements for said Indians as they may desire, for the permanent location in the northern part of this State, under such provisions in regard to schools,

churches, agricultural and mechanical arts, as will the best promote their present and future welfare, and adjust all matters of right and equity that may not be in dispute between said Indians and said government, in a spirit of just liberality."

On February 9, 1853, Joint Resolution No. 17 (1853 Public Laws, pp 203-206) (Attachment 3) was passed relative to the Lake Superior Chippewa, and whose text reads in relevant part:

"*Whereas,* By articles of treaty made and concluded at La Pointe, of Lake Superior, October fourth, eighteen hundred and forty-two, between the United States and the Chippewa Indians of the Mississippi and Lake Superior, the country occupied by said Indians was ceded to the United States; and in consideration of said cession, the United States engaged 'to pay to the Chippewa Indians of the Mississippi and Lake Superior, annually, for twenty-five years, twelve thousand five hundred dollars in specie; ten thousand five hundred dollars in goods,' and other payments, and to provide certain officers, schools, &c., for said Indians;

"*And whereas,* . . . said annuities to that portion of said Chippewas residing in the Lake Superior district have heretofore, until about two years past, been paid at La Pointe, of Lake Superior, and for the past two years have not been paid to said Chippewas of Lake Superior in consequence of their great distance from the present point fixed for said payments, at Sandy Lake, near the head waters of the Mississippi, which point they are unable to reach, and return to their homes on Lake Superior before the rigors of winter have barred their passage;

"*And whereas*, It is believed the cause of the change in place of payment on the part of the United States, is owing to the desire of the general government to hasten the removal of said Chippewas of Superior, to lands not ceded in said treaty, . . .;

"*And whereas*, That portion of said Chippewas embraced in said treaty, now settled at L'Ance and vicinity on Lake Superor, in the State of Michigan, who have been unable to receive their share of said annuities for the past two years, for the reasons aforesaid, now number upwards of one hundred families; have abandoned the wandering habits and war-like pursuits which characterize the red men of the forest, for the peaceful occupations and christian precepts of the white man; have learned our language and our laws, and cordially yield obedience thereto; have accepted the boon tendered to them by the people of the State of Michigan, on the adoption of its constitution, by disbanding their organization in tribes, and becoming electors under that constitution; have exercised the right of suffrage in a manner which shows their intelligence and discrimination, and their fitness for the enjoyment of the high privileges of American citizens; have purchased and become the actual and legal owners of tracts of land to the amount of about one thousand acres, upon which they now reside, and much of which they have cultivated and improved; have learned and are now in the constant practice of the arts of husbandry and the mechanic arts; raise a considerable amount of stock, grains and vegetables, which have become indispensible to the operatives in the mining districts of Lake Superior; have established schools, in which the English language, and the ordinary routine of an English education are taught to their youth; have erected school houses and churches, and have become moral, industrious, sober and useful inhabitants, having

an ardent desire to remain in peace and social harmony with the citizens of the Upper Peninsula of Michigan, and there to receive the share to which they are entitled under the treaty aforesaid;

"*And whereas*, The citizens residents in their vicinity unanimously desire that the Chippewas aforesaid should remain among them, and have petitioned, in accordance with the desire of said Indians, that their annuities should be paid them at L'Ance, on Lake Superior;

"*And whereas*, The payment of said annuities at that place can be made more economically to the General Government than at Sandy Lake, and requiring said Indians to go from their homes at L'Ance to the place of payment, would tend not only to cause them great loss of time, and much embarrassment, delay, and expense, but would also tend to efface from their minds the salutary precepts of their instructors, and to lead them from their present habits of sobriety, temperance, and industry, to their original wandering habits, and to irregularities and intemperance, from the contaminating influence of the example of their red brethren, who are not, like them, improved in the arts and virtues of civilization;

"*And whereas*, By requiring said Indians permanently to remove from their residence, they would be obliged to abandon their farms, school houses, and churches, and their instructors would be brought into the vicinity of their natural enemies, the Sioux, and into permanent contact with their brethren who have as yet made little improvement; and such removal would evidently tend to degenerate them, and cause them to return to their former state, and to the pursuits of savage life;

"*And whereas,* It is understood that the general government has dispensed with the farmer, blacksmith, carpenter, and school, and sold the oxen heretofore provided for said Indians, under the treaty aforesaid, and for the purpose, as is believed, to hasten their removal from their present residence; which provisions in said treaty are now not only useful but necessary for the continued improvement of said Indians;

"*And whereas,* In the opinion of the Legislature, the payment of said annuities, and the restoration of said officers, school, and oxen, without requiring the removal of said Indians, is manifestly equitable, would tend to bind them with the strong cords of love and affection to the white population, to our government, to the cause of education, and the divine precepts of morality and christianity, which are the foundation of our political strength, preserving uncontaminated by ignorance and vice the purity of our political principles, and the permanency of our free institutions, and would tend, in some small degree, to mitigate the wrongs of an injured race, second to none in the exalted attributes of magnanimity, generosity, and gratitude, but whose destiny has seemed to be to retire at the approach of enterprise, and disappear as civilization advances; therefore

"*Resolved by the Senate and House of Representatives of the State of Michigan,* That our Senators and Representatives in Congress be earnestly requested to make the necessary applications, and to urge the passage of such laws as may be requisite to provide for the payment to the Chippewa Indians, now residing at L'Ance and vicinity, on Lake Superior, of their pro rata amount of the annuity guarantied to them by the treaty made between the United States and the Chippewa Indians, October fourth, eighteen hundred and forty-two, and

that they may not be required to remove from lands selected, purchased, and owned and occupied by them, or from their present residence, at and near L'Ance aforesaid; and that the annuities now due them, and hereafter to become due to them, may be paid at L'Ance, on Lake Superior; and the offices of farmer, blacksmith, and carpenter, and their school and oxen be restored to the Indians aforesaid.

"*Resolved further,* That the Governor of this State be requested to forward copies of these resolutions to our Senators and Representatives in Congress, to the President of the United States, and to the heads of the departments of the general government.

"Approved February 9, 1853."

It is apparent that, in many respects, the Treaty of 1854 is directly responsive to the concerns raised by the Michigan Legislature in its 1853 Joint Resolution which requested abandonment of the removal policy under the 1842 Treaty, establishment of permanent reservations, and performance of annuity provisions thereunder. While not before the Courts below, this 1853 Resolution constitutes contemporary evidence of the " 'surrounding circumstances' " which with other evidence, aids in determining intent. See *Rosebud Sioux Tribe* v *Kneip,* 430 US 584, 587 (1977).

It is submitted that this resolution, transmitted to the President, Congress, and the Commissioner of Indian Affairs, a year and a half before the 1854 treaty was negotiated with the Chippewa, lends additional, significant support to the holding of the District Court that

"The evidence strongly implies the parties' contention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food on the earlier ceded lands. That general intention is not inconsistent with the specific intention the Gurnoe court [*State* v *Gurnoe*, 53 Wis 2d 390; NW2d 892 (1972)] inferred from the 1854 treaty to allow Indians special hunting and fishing rights on certain limited parts of the ceded territory adjacent to their reservations when it appears that the reservations were located so as to give the Indians access to the adjacent resource." (146a).

RELIEF SOUGHT

For the foregoing reasons, this Court should accord plenary consideration to this appeal, or, alternatively, treat it as a petition for a writ of certiorari and grant the writ.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
State of Michigan

Louis J. Caruso
Solicitor General
(Counsel of Record)

Michael J. Moquin
Assistant Attorney General
Appellate Division
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

July 13, 1983

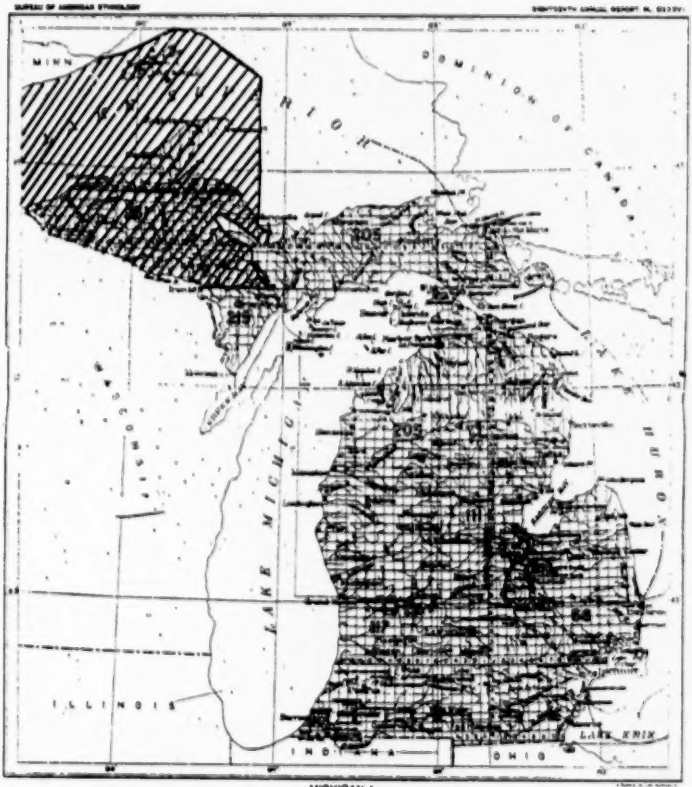
ATTACHMENTS

1. Michigan cession of Chippewa under Treaty of 1842 (Bureau of American Ethnology, 18th Annual Report, Plate 136).

2. Joint Resolution No. 15, Michigan Legislature, 1851 Public Laws, pp. 258-259.

3. Joint Resolution No. 17, Michigan Legislature, 1853 Public Laws, pp. 203-206.

ATTACHMENT 1



SHADED AREA: MICHIGAN LANDS CEDED IN TREATY OF 1842

ATTACHMENT 2

1851 Public Laws of Michigan

[No. 15]

JOINT RESOLUTION relative to the Ottawa and Chippewa Indians.

Whereas, The constitution of the State of Michigan gives unto all civilized persons of Indian descent equal rights and privileges with the white inhabitants of said State;

And Whereas, By the adoption of said clause in the constitution, the people of this State have evinced a just and humane desire to see the Indians who now inhabit Michigan, raised from a state of semi-barbarism to one of enlightment, and have by it removed one great barrier that has hitherto prevented the consummation of this philanthropic object;

And Whereas, The Ottawa and Chippewa Indians residing amongst us, are a civil, well-disposed, peaceable and orderly people, and have, during the few past years, made great advancement in the agricultural and mechanical arts, and a large portion of them ardently desire to remain in Michigan, to become civilized, and share with us in our social, political and religious privileges; therefore,

Be it resolved by the Senate and House of Representatives of the State of Michigan, That we do hereby request the government of the United States to make such arrangements for

said Indians as they may desire, for their permanent location in the northern part of this State, under such provisions in regard to schools, churches, agricultural and mechanical arts, as will the best promote their present and future welfare, and adjust all matters of right and equity that may now be in dispute between said Indians and said government, in a spirit of just liberality.

Resolved further, That the Governor be and he is hereby requested to forward a copy af the foregoing preamble and joint resolution to the President of the United States, to the Hon. the Secretary of the Home Department, to the Hon. the Commissioner of Indian Affairs, and to each of our Senators and Representatives in Congress.

This joint resolution shall take effect immediately.

Approved April 7, 1851.

ATTACHMENT 3

1853 Public Laws of Michigan

RESOLUTIONS 203

[No. 17]

JOINT RESOLUTION relative to the Chippewa Indians of Lake Superior.

Whereas, By articles of treaty made and concluded at La Pointe, of Lake Superior, October fourth, eighteen hundred and forty-two, between the United States and the Chippewa Indians of the Mississippi and Lake Superior, the country occupied by said Indians was ceded to the United States, and in consideration of said cession, the United States engaged "to pay the Chippewa Indians of the Mississippi and Lake

Superior, annually, for twenty-five years, twelve thousand five hundred dollars in specie; ten thousand five hundred dollars in goods," and other payments, and to provide certain officers, schools, &c., for said Indians;

And whereas, It also provided by said treaty that said annuitties "shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share," which said annuities to that portion of said Chippewas residing in the Lake Superior district have heretofore, until about two years past been paid at La Pointe, of Lake Superior, and for the past two years have not been paid to said Chippewas of Lake Superior, in consequence of their great distance from the present point fixed for said payments, at Sandy Lake, near the headwaters of the Mississippi, which point they are unable to reach, and return to their homes on Lake Superior before the rigors of winter have barred their passage;

And whereas, It is believed the cause of the change in place of payment on the part of the United States, is owing to the desire of the general government to hasten the removal of said Chippewas of Superior, to lands not ceded in said treaty, the policy and propriety of said removal being, in our opinion, based upon the belief which has gained strength from the usual degeneration of the habits of Indians at the approach of civilization, that they are unfitted to become useful citizens, and their presence pernicious to the promotion of morality, christianity, and the arts and improvements of civilized life;

And whereas, That portion of said Chippewas embraced in said treaty, now settled at L'Ance and vicinity, on Lake Superior, in the State of Michigan, who have been unable to receive their share of said annuities for the past two years, for the reasons aforesaid, now number upwards of one hundred

families; have abandoned the wandering habits and warlike pursuits which characterize the red men of the forest, for the peaceful occupations and christian precepts of the white man; have learned our language and our laws, and cordially yield obedience thereto; have accepted the boon tendered to them by the people of the State of Michigan, on the adoption of its constitution, by disbanding their organization in tribes, and becoming electors under that constitution; have exercised the right of suffrage in a manner which shows their intelligence and discrimination, and their fitness for the enjoyment of the high privileges of American citizens; have purchased and become the actual and legal owners of tracts of land to the amount of about one thousand acres, upon which they now reside, and much of which they have cultivated and improved; have learned and are now in the constant practice of the arts of husbandry and the mechanic arts; raise a considerable amount of stock, grains and vegetables, which have become indispensible to the operatives in the mining districts of Lake Superior; have established schools, in which the English language, and the ordinary routine of an English education are taught to their youth; have erected school houses and churches, and have become moral, industrious, sober and useful inhabitants, having an ardent desire to remain in peace and social harmony with the citizens of the Upper Peninsula of Michigan, and there to receive the share to which they are entitled under the treaty aforesaid;

And whereas, The citizens residents in their vicinity unanimously desire that the Chippewas aforesaid should remain among them, and have petitioned, in accordance with the desire of said Indians, that their annuities should be paid them at L'Ance, on Lake Superior;

And whereas, The payment of said annuities at that place

can be made more economically to the General Government than at Sandy Lake, and requiring said Indians to go from their homes at L'Ance to the place of payment, would not only cause them great loss of time, and much embarrassment, delay and expense, but would also tend to efface from their minds the salutary precepts of their instructors, and to lead them from their present habits of sobriety, temperance, and industry, to their original wandering habits, and to irregularities and intemperance, from the contaminating influence of the example of their red bretheren, who are not, like them, improved in the arts and virtues of civilization;

And whereas, By requiring said Indians permanently to remove from their residence, they would be obliged to abandon their farms, school houses, and churches, and their instructors would be brought into the vicinity of their natural enemies the Sioux, and into permanent contact with their bretheren who have as yet made little improvement; and such removal would evidently tend to degenerate them, and cause them to return to their former state, and to the pursuits of savage life;

And whereas, It is understood that the general government has dispensed with the farmer, blacksmith, carpenter, and school, and sold the oxen heretofore provided for said Indians, under the treaty aforesaid, and for the purpose, as is believed, to hasten their removal from their present residence; which provisions in said treaty are now not only useful but necessary for the continued improvement of said Indians;

And whereas, In the opinion of the Legislature, the payment of said annuities, and the restoration of said officers, school, and oxen, without requiring the removal of said Indians, is manifestly equitable, would tend to bind them with the strong cords of love and affection to the white population, to our government, to the cause of education, and the divine precepts of morality and christianity, which are the foundation

of our political strength, preserving uncontaminated by ignorance and vice the purity of our political principles, and the permanency of our free institutions, and would tend, in some small degree, to mitigate the wrongs of an injured race, second to none in the exalted attributes of magnanimity, generosity, and gratitude, but whose destiny has seemed to be to retire at the approach of enterprise, and disappear as civilization advances; therefore

Resolved by the Senate and House of Representatives of the State of Michigan, That our Senators and Representatives in Congress be earnestly requested to make the necessary applications, and to urge the passage of such laws as may be requisite to provide for the payment to the Chippewa Indians, now residing at L'Ance and vicinity, on Lake Superior, of their pro rata amount of the annuity guarantied to them by the treaty made between the United States and the Chippewa Indians, October fourth, eighteen hundred and forty-two, and that they may not be required to remove from lands selected, purchased, and owned and occupied by them, or from their present residence, at and near L'Ance aforesaid; and that the annuities now due them, and hereafter to become due to them, may be paid at L'Ance, on Lake Superior; and the offices of farmer, blacksmith, and carpenter, and their school and oxen be restored to the Indians aforesaid.

Resolved further, That the Governor of this State be requested to forward copies of these resolutions to our Senators and Representatives in Congress, to the President of the United States, and the heads of the departments of the general government.

Approved February 9, 1853.